OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 23 OCTOBER 1974 [1]

Mr President,

Members of the Court,

1. Though Case 26/74 (an action for damages brought against the Commission) and Case 34/74 (a reference for a preliminary ruling from the Lille court on interpretation of certain rules of Community regulations) have different procedural characteristics, it is convenient to take them together because the same company is involved in each of them and some of the essential issues which they raise are substantially the same. Moreover, the outcome of Case 34/74, depending on the answer given to the question referred by the French court, could be a decision at national level to make good the loss in respect of which the plaintiff company is seeking damages from this Court in its action against the Commission in Case 26/74.

It does not often happen that, in proceedings for repayment of sums which the plaintiff claims to have been illegally exacted, the defendant agrees with him. But this is what has happened in the proceedings for a preliminary ruling set in motion by the Tribunal d'instance of Lille in connexion with the action between the Roquette company, as plaintiff, and the French Customs Authorities, as defendant. In oral observations submitted before this Court, the French Government declared that, in collecting the compensatory amounts on exports of amyloid products, it complied with Regulation 218/74/EEC in which the Commission fixed the compensatory amounts, as required by Council Regulation No 974/71. At the same time, the French Government expressed its belief that under the principles laid down in that basis Regulation, compensatory amounts ought not to be levied on exports of cereal-based products if no compensatory amounts are applicable to exports of cereals proper.

While defending its action on the ground that the wording of a specific requirement of Article 4 a (2) of the Council Regulation left it with no alternative, the Commission accepts that the position which has arisen must be regarded as wholly abnormal and far from consistent with either the proper functioning of the common market or the objectives of the regulation setting up the mechanism of compensatory amounts. This is so much the case that it sought on two occasions to persuade the Council to accept amendments to this particular provision of Article 4 a (2) which was added to Regulation No 974/71 by means of Regulation No 509/73, and is the cause of the anomalies complained of. These emerged as a result of the changed situation of the world market in cereals where price levels, which were substantially lower than those prevailing in the Community, rose, shortly after adoption of the new rule, to levels higher than those in the Community, whereas Article 4 (a) had been designed to deal with the previous situation.

2. It is well known that, pending the fixing of new exchange parities, the desired level of prices and related data have, as regards products subject to an intervention price and products whose price depends on the price of those products, have, even in countries where there is a floating currency, continued to be calculated on the basis of the parities previously notified to the International Monetary Fund. Consequently, though in theory remaining unchanged, these

1 — Translated from the Italian.

prices rose or fell according to the currency in which they were expressed by an amount equal to the *de facto* revaluation or devaluation of the currency, and this created disturbances in trade in agricultural products which were calculated to give rise to speculation and developments at variance with the intervention system embodied in the agricultural regulations of the Community.

It was for the specific purpose of avoiding such disturbances in the working of the common agricultural organization that the system of compensatory amounts was established: it was intended to offset the consequential effects of currency movements on the price of basic products for which there are fixed intervention prices and of agricultural products whose price depends on that of the basic product.

The Court has already had occasion, quite recently, to concern itself with problems connected with the currency fluctuations and the working of the system introduced by the Community to prevent the distortions which would accrue therefrom in the working of the market in agricultural products (Case 5/73, *Balkan-Import-Export,* [1973] E.C.R. 1091, Case 9/73, Schlüter, ibid. 1175). I believe it to be therefore unnecessary for me to describe in detail the mechanism of compensatory amounts and, on this point, I refer to the judgments cited and, more particularly, to the opinion of Mr Advocate-General Roemer in Case 5/73. In so doing, I shall endeavour to reduce to the simplest terms subject-matter which bristles with dry technical provisions, raises a host of problems and has some contraditory aspects.

As regards the enactments which we must take into account, I shall confine myself to reminding you of Community legislation on the subject which is directly relevant in the present cases.

The last paragraph of the preamble to Regulation No 974/71 of the Council introducing compensatory amounts declares that the compensatory amounts to be applied should be limited to the amounts strictly necessary to compensate for the incidence of the monetary measures on the prices of basic products covered by intervention arrangements and that it is appropriate to apply them only in cases where this incidence would lead to difficulties.

Article 2 (2) of the Regulation lays down that products whose price depends on that of products covered by intervention arrangements under the common organization of agricultural markets and which form part of the common market organization, as in fact applies in the case of the amyloid products we are concerned with, the compensatory amounts shall be equal to the incidence, on the prices of the product concerned, of the application of the compensatory amount to the prices of the basic product on which they depend.

This rule was not changed by Regulation No 509/73 of the Council, which extended to States whose currency decreases beyond the permitted fluctuation margin the system of control which, under the previous regulation, applied exclusively to States whose currency increases in value beyond the permitted fluctuation margin under the international rules in force; the Regulation also made it obligatory to apply this system of control. The regulation added Article 4 a to the basic Regulation, No 974/71. This article was designed to prevent imports from third countries reaping the benefit of a compensatory amount big enough to give the impression of being an import subsidy, which is what would have happened when a downward movement of a currency exceeded certain limits. In one of its provisions, contained in the second paragraph, the article lays down that, in trade between the Member States and with third countries, the compensatory amounts applicable due to the increase in value of the currency concerned may not be higher than the

charge on products imported from third countries.

Account should also be taken of the provision of Article 14 of Regulation No 120/67 of the Council on the common organization of the market in cereals, under which importation of cereal-based starches is subject to a levy made up to two components:

(a) a variable component corresponding to the incidence on their prime cost of the levies on the basic products from which they have been produced;

(b) a fixed component designed to protect the processing industry.

Only the first of these two components, the variable component, reflects the incidence of the price of basic products on the processed products.

3. In the present case, the anomalies complained of by the Roquette company and not disputed by the other interveners arise from the fact that, in a new situation marked by the absence of a levy on imports from third countries of the basic products owing to the high price of those products on the world market, and the consequent absence of the import levies applied, as mentioned in the second paragraph of Article 4 a of Regulation 509/73, to such basic products, the compensatory amounts nevertheless continue to be applied to the derived products. The outcome of this is that the French exporter of those products is placed at a disadvantage compared with his competitors in other Member States whose currency has not also moved in a downward direction.

This situation, which, in the Roquette company's view, is in direct conflict with the provision of Article 2 (2) of the basic regulation, No 974/71, arises from the fact that, in applying, as laid down in Article 4 a (2), the principle of equalization based on the concept of 'charge on importation', which constitutes the maximum compensatory amount allowable, the Commission took into account not only the amount of the variable component of the levy (the first of the components mentioned above but also of the fixed component designed to protect the processed products industry of the Community.

In order to avoid the anomalous situation created by applying the regulation in this way, the Commission had, as soon as the reversal occurred in the relationship between world and Community prices for cereals, submitted a draft regulation to the Council designed to amend Article 4 a (2) by providing that, when the charge on importation consisted of more than one component, the only component to be taken into account in applying the compensatory amounts would be the component designed to reflect the difference in the prices of the basic products. A few weeks ago the Commission decided to suspend application of the provision (see Article 1 of Regulation No 2497/74 of 2 October 1974, OJ L 268, p. 5).

The first question which the Court must now resolve is whether, under the rules in force at the material time in each of these cases, the Commission was or was not under an obligation, in taking the action it did in each case, to take account of the fixed component of the levy in determining the compensatory amount to be charged.

4. What precisely is the nature of the anomaly of which the Roquette company and the French Government complain? As an example, the representative of the Roquette company quoted the Belgian starch producer who buys maize in France and then sells the starch produced from it without having to pay any compensatory amount, while the French producer who exports starch to Belgium has to pay a compensatory amount commensurate with the quantity of maize used. This represents manifestly unequal treatment of two Community undertakings for which, given the object of the system of compensatory amounts,

there can be no justification and which runs counter to one of the principles underlying the Community legal system. Suffice it here to recall the principle, expressed in the last paragraph of the preamble to the basic regulation, that the compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products. In the example before us, it is obvious that this principle is breached because the Belgian producer has paid for the basic product in the same currency and at the same price as the French producer. The example could be taken a stage further by considering a situation in which starch produced from French maize is exported from Belgium into France. On the basis of the way the Commission applied Article 4 a (2), the exporter in that situation would receive a compensatory amount which manifestly could not serve, as it should, to offset the incidence of the monetary measures on the basic product, because the product was bought in France and exported to Belgium without being subjected to compensatory charges.

It is true that the real source of the trouble can be identified not as the fact that a compensatory amount is imposed on the French starch exporter but rather as the exemption of the Belgian purchaser of French maize from paying an equivalent charge on exportation of the basic product concerned. Such a charge would, perhaps, have been more consistent with the structure of the compensatory amount system by restoring, in the working of the Community organization of the agricultural markets, the balance which the various fluctuations of national currencies placed at risk. This is the situation to which, now that application of the provision has been suspended, we appear to be returning, at least for the time being.

But, despite failure of the legislature to act in time, would it have been possible, during the material period, to have avoided the anomalies arising from application of the rule?

To answer this question, the provision in Article 4 a (2) must be looked at in the light of the system of which it forms part, the other rules and its own basic objects and principles.

First of all we must bear in mind the general rule in Article 2 (2) of Regulation No 974/71 laying down that the compensatory amount on the processed product shall be equal to the incidence which the compensatory amount applied to the basic agricultural product has on its price.

This general prescription for parity, embodied in the mechanism provided for under Article 4 a, would therefore have the effect of depriving the fixed components of the levy, which are not determined by the price of basic agricultural products, of any real importance because they could not serve to increase the compensatory amount on the processed products beyond the limit permitted under this general prescription. Thus, in cases where the compensatory amount on the raw material which would be applied if Article 4 a did not exist was, in accordance with this rule, reduced to zero (as, indeed, happens when the amount of the levy on imports of the basic product from third countries is nil), no compensatory amount could be applied even to the derived products. It is true that, on a strictly formal view, it would not, in order to produce this result, be necessary to interpret the concept of 'charge on importation', which underlies Article 4 a (2), in such a way to relate it exclusively to the variable component of the charge on importation from third countries. As the Roquette company points out, it would, even on the wider interpretation, be sufficient in applying the provision to have regard to the general prescription for parity laid down under Article 2.

But this, in practice, means that the fixed components of the charge on

importation from third countries could not influence the calculation of the compensatory amount, because it is only in respect of conditions reflecting world prices of raw materials which are higher than or very close to Community prices (i.e. when the variable component of the charge on importation is nil or extremely small) that taking these fixed components into account could have any impact on the level of the compensatory amount.

To my mind, this last conclusion defeats the contention of the Danish Government, which is based on the argument that the object and economic effect of the fixed components are to ensure higher prices for products processed in the Community, and thus to cover the higher costs which the Community producers have to meet; from this argument the Danish Government draws the conclusion that it is necessary to have regard to these components in order to make an indirect comparison of prices in accordance with Article 4 a (2).

5. Is such an exclusion of the fixed components of the levy from the calculation compatible with the specific purpose of the rule laid down in Article 4 a (2)?

As the Commission pointed out, when, by means of this rule, a maximum limit was placed upon the compensatory amounts applicable as a result of a depreciation in the value of the currency concerned, the intention was to prevent imports from third countries from being effected below the world market price.

If that is the purpose of the rule, only those components of the levy which serve to make up the difference between the world price for the product and the Community price may be taken into account, because only those components are of any value or importance in achieving its underlying aim. In the circumstances, the calculation should disregard the fixed component which is added to the variable component of the levy, because the fixed component is not intended to make up any difference between the level of the world and of the Community price for the product.

If, therefore, regard is paid to the specific purpose of Article 4 a (2), this produces the same result as application of the general rule in Article 2. In this way, the application of Article 4 a (2) would also be consistent with the objective underlying and the principles laid down in the final paragraph of the preamble to Regulation No 974/71. This declares that it is appropriate to apply the intervention arrangements only in cases where the incidence of the monetary measures on the prices of basic products would lead to difficulties. This does not appear to have been the position in the sector with which we are concerned. The inequality of treatment which, contrary to the general principles of the common market, resulted from the way in which the Commission applied Article 4 (2) is further justification for the conclusion that such an interpretation is contrary to the spirit and the letter of the legislation which it purports to interpret.

Given the need for consistency in the pattern of the rules concerned, the literal interpretation in the contrary sense which the Commission and the Danish Government place on the expression 'charge on importation' employed in Article 4 a (2) must be abandoned in face of the interpretation required by logic and the aetiology of the system.

6. But the Commission relies on another practical argument which compels anyone interpreting the regulations and who, especially in dealing with questions of economic law, cannot ignore the practical outcome of any interpretation of their wording, to take a wider view and ask himself further questions.

The Commission maintains that, if no account had been taken of the fixed components of the charge on importation, problems greater than those

which actually arose could have arisen, not however, in the sector of amyloid products with which the present cases are concerned but in other sectors, particularly the pigmeat sector. There, for reasons peculiar to that sector, and because there was no compensatory amount on exports to countries with a strong currency from countries with a weak one, speculative operations would have been possible on the basis of massive exports of those products and their sale to the intervention agencies of countries with a strong currency so as to take advantage of the difference in the rates of exchange, which is what the regulation was designed to prevent.

The use of pigmeat as an example, at least as the Commission presented it, may not be a particularly convincing one, in view of the fact that it is the very Member States whose currency is weak, such as Italy, the United Kingdom and France, who are short of meat while Ireland, which exports it on a large scale, occupies a very minor place in this sector of the Community's economy. It is well known that the main producer-exporters of pigmeat in the Community are Denmark and the Netherlands, both of whom have a 'strong' currency.

But leaving aside the weakness of this example, which, however, cannot be wholly discounted because it is used to support an eminently practical argument, it is clear that the alleged risks which are threatened might arise from the maintenance in force of a rule limiting compensatory amounts whereas in certain sectors it is expedient to employ a more effective method of offsetting currency variations. In these circumstances, to take account in the calculation of the fixed component of the charge on importation could constitute at most a second-best alternative which made it possible to alleviate, if not to eliminate, the difficulties arising from the restrictions imposed by the rule and which were castigated by the Commission in the preamble to the draft regulation submitted to the Council on 6 September 1974 (OJ C 107, p. 5).

The whole problem arises from the fact that Article 4 a (2), which was designed to meet the opposite situation to the one which actually occurred, has remained in force despite the new situation. This is a situation which cannot fail to produce aberrant and contradictory results, subjecting some Community operators to charges which are quite unjustified from the point of view both of the underlying objectives of the particular system of compensatory amounts and of the general principles of the Community order, and consequentially placing other operators in a position of unwarranted advantage while, on the other hand, preventing proper compensation being provided in other sectors for exchange variations and leading to disturbance of the market and distortion of competition.

In the face of such contradictory results, all of them unacceptable to the extent that they are at variance with the objects of the system, in my view the only feasible basis on which to make an interpretative ruling is that of avoiding the worst. From that standpoint, there can be no ignoring the fact that, now that the Council has decided to suspend operation of the rule, the difficulties involved, both those which arose in practice after the Commission implemented the relevant rule and those it apprehended if the rule were implemented in a different way, are past and done with; and it is to be hoped that the competent Community authorities will refrain from applying the rule afresh to meet specific economic contingencies.

In view of this, while the interpretation suggested by the Commission would have had the undoubted disadvantage of making it a matter of chance whether loss suffered by an undertaking through being placed at an unfair disadvantage compared with its competitors in the Community would ever be made good, a different interpretation, placed on

the provision in the light of the prescription for parity laid down under Article 2 (2) and of the general principle in the final recital of Regulation No 974/71, would not give rise to the sort of danger apprehended by the Commission.

7. Coming now to my recommendation on the question referred for a preliminary ruling, I realize how the task of those called upon to give a theoretical ruling on a question of interpretation, whether of individual rules or of the body of rules to be applied, assumes peculiar significance in the complex context of these changing issues in a developing economy. This is because it is essential that the relative legislative provisions should be capable of being applied in such a way as to meet a variety of contingencies, whether or not they entered into the calculations of the legislature. This means that, in framing the reply to be given to the questions referred by the Lille court, too, it is not possible to get away from the particular market situation involved. I must also emphasize that, in this case, the two tasks assigned separately to the Court of Justice under Article 177 of the Treaty overlap or are intertwined. Indeed, the reply I am suggesting is based on alternative solutions: either the interpretation of the rule concerned is one which enables principles to be observed or the ruling may have to be one of invalidity.

The body of rules which represent the outcome of the addition of the restrictive provision to Regulation No 974/71, and of the exceptions in some respects created by Article 4 a (2), by reason of the new world price situation diametrically opposed to that on which the rule was based, no longer lends itself to one and the same application in respect of all processed products which is consistent with its principles and objectives at the same time perfectly viable. In a situation in which the rules are so inappropriate, therefore, it is the responsibility of the Court to match the spirit of the rules with the reality, as regards both their objectives and the basic requirements of the body of legislation concerned, in order to prevent the undoubted disadvantages which are the cause of undesirable distortions.

In view of what has been said about the origin and purpose of Article 4 a (2), if, because of the contention of the Commission and the Danish Government for a literal interpretation, the Court felt unable to accept my suggestion and place a restrictive interpretation on the concept of 'charge on importation', it would perhaps be necessary to invoke a principle which achieves its full significance in the regulation of economic relationships. This principle embodied in the maxim 'cessante ratione legis, cessat et ipsa lex'; its application would mean that, at least in part, the rules would cease to apply.

This would be another way of applying the body of rules without creating the anomalies described.

It has been seen that, in the absence of a corresponding charge on the basic product, the application of compensatory amounts to amyloid products is in itself a source of distortion, whereas there would appear to be no reason for apprehending difficulty if these amounts did not apply. In other producing sectors, on the other hand, it may, to avoid difficulty, be necessary to apply a compensatory amount to the processed product even though there is no corresponding charge on the basic product.

We know, however, that, under the general principle laid down in Regulation No 974/71, the compensatory amounts should be applied only in cases where the incidence of the monetary measures on the prices of basic products would lead to difficulties.

Returning to the general principle laid down in the basic regulation, which echoes the old maxim that, when a rule loses its *raison d'être,* it must cease to be applied, it might be possible to justify application of Article 4 a in the way the Commission interprets it in those sectors

where differential application of compensatory amounts has not conflicted with the objectives of the system, but its application on these lines should be avoided in sectors where there are no difficulties to cause concern.

This would be a practical solution. It would have the merit of avoiding the possibility of casting doubt on the consequences of all past applications of the rule, but I confess that this would not have the same degree of consistency and clarity as the first alternative I suggested.

8. Accordingly, I propose that the answer to be given to the questions referred by the Lille court should be to the effect that it is impossible for the fixed component of the charge levied on imports from third countries to be taken into account in such a way as to cause compensatory amounts to be applied to derived products in a case where no charge is applicable to exports of the corresponding basic product.

Very much as a subsidiary point, it is, where practical considerations are paramount, conceivable that the fixed component could be taken into account in cases where, in the specific sector of derived products concerned, it was found that there was a real danger of those difficulties which Regulation No 974/71 is designed to avoid.

Otherwise, it would have to be recognized that Article 4 a (2) of Regulation No 974/71 would conflict with the general objectives and principles established by the regulation as well as with the general principles governing application of the Treaty, especially the principle of equality as between all subject to the charges imposed under Community legislation; and that this conflict would invalidate this provision at least in part.

In view of the effects which would accrue from such an interpretation for the plaintiff in the case pending before the French court, I do not believe that this Court ought meanwhile to rule on the claim for damages which is the subject of Case 26/74. Proceedings in that case should therefore be stayed. On the basis of the new situation, *de facto* and *de iure,* they can if necessary be reopened at the request of the undertaking concerned if it is not satisfied with the outcome of the action pending before the national court.